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AMERICAN PRESIDENT LINES, LTD. and
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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13 In the Matter of the Arbitration between
14 AMERICAN PRESIDENT LINES, LTD., and
15 APL CO. Pte., LTD.

16 Petitioners,

17 v.

18 D.S.R. SHIPPING CO., INC., a corporation,
19 Respondent.
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21
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No. C 07-03220 SC

NOTICE OF MOTION AND MOTION
TO CONFIRM ARBITRATION
AWARD; MEMORANDUM OF POINTS
AND AUTHORITIES

[9 U.S.C. section 9]

Hearing Date: November 16, 2007
Hearing Time: 10:00
Courtroom: 1, 17th Floor

The Honorable Samuel Conti

I. NOTICE OF MOTION

TO EACH PARTY AND ITS ATTORNEY OF RECORD:

YOUR ARE HEREBY NOTIFIED THAT on November 16, 2007, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 1, 17th Floor of this Court, located at 450 Golden Gate Avenue, San Francisco, California, Petitioners American President Lines, Ltd. and APL Co. Pte., Ltd. (collectively “APL”) will and hereby do move this Court pursuant to 9 United States Code section 9, for an order confirming the arbitration award in favor of APL and against Respondent D.S.R. Shipping Co., Inc. (“D.S.R.”). This motion is based on this Notice; the following Memorandum of Points and Authorities; the accompanying Declaration of Mark K. de Langis; the previously filed Petition for Order Confirming Award of Arbitrator and exhibits thereto; and all argument, oral testimony, and other information introduced at the hearing on this motion.

II. RELIEF SOUGHT

By this motion, APL requests that the Court enter an order confirming the Award of Arbitrator, in the arbitration between APL and D.S.R. (A true and correct copy the Award of Arbitrator, is attached to APL’s Petition for Order Confirming Award of Arbitrator as Exhibit C; filed with the Court on June 19, 2007.) After proper submittal of proof, the arbitration award was executed and served on all parties by the duly appointed arbitrator, Richard J. Collier, Esq., on April 18, 2007. D.S.R. has yet to pay any portion of the award. Accordingly, APL seeks an order confirming the arbitration award and also requests that a judgment be entered in conformity with the terms of the arbitration award.

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1 III. POINTS AND AUTHORITIES

2 A. Background

3 In June of 2003, a service contract¹ was entered into between APL and D.S.R. (*See*
 4 Service Contract Number LA02/0103 (“Service Contract”), attached as Exhibit A to APL’s
 5 Petition for Order Confirming Award of Arbitrator (“Petition”), filed on June 19, 2007.) D.S.R.
 6 desired to ship cargo in international commerce from the United States to Latin America. (*See*
 7 Service Contract, Appendix F, ¶¶ 1-3, attached as Ex. A to Petition.) As might be expected,
 8 D.S.R. bargained for favorable ocean freight rates for its shipments.

9 In return for providing favorable ocean freight rates on D.S.R.’s shipments, APL
 10 demanded a “Minimum Volume Commitment” from D.S.R., so that APL could make up in
 11 volume what it gave away in rates on any particular shipment. To this end, D.S.R. agreed to ship
 12 a minimum volume of 50 FEUs over the life of the contract, from June 18, 2002 through June
 13 29, 2003. (*See* Service Contract, App. F, ¶¶ 4 and 8, attached as Ex. A to Petition.)

14 As is common practice in the industry, and in particular, as is common practice by APL,
 15 a liquidated damages clause (dead freight) was included in the Service Contract to provide APL
 16 with protection, in the event that D.S.R. failed to ship the required number of FEUs. (*See*
 17 Service Contract, p. 3 of 8, § 3(b), attached as Ex. A to Petition.) In the Service Contract, D.S.R.
 18 agreed to pay \$350 for each FEU “by which the Minimum Volume Commitment exceeds the
 19 volume actually tendered.” (Service Contract, p. 3 of 8, § 3(b).)

20 Over the course of the contract’s term, D.S.R. shipped 8 FEUS, not the 50 FEUs as

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 22 ¹ “[S]ervice contract’ means a written contract, other than a bill of lading or a receipt, between one or
 23 more shippers and an individual ocean common carrier or an agreement between or among ocean
 24 common carriers in which the shipper or shippers makes a commitment to provide a certain volume or
 25 portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a
 certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation,
 or similar service features. The contract may also specify provisions in the event of nonperformance on
 the part of any party.” 46 U.S.C. app. 1702(19).

1 required under the Service Contract. (*See* Invoice Number COGMD3K441, dated January 19,
 2 2004, attached as Ex. B to Petition.) Accordingly, D.S.R. became obligated to pay dead freight
 3 charges on 42 FEUs (\$14,700), as per the Service Contract. (*See id.*) D.S.R. has paid nothing
 4 towards the dead freight owed.

5

6 **B. THE ARBITRATION**

7 APL and D.S.R. agreed in the Service Contract, at section 4, to resolve any dispute
 8 arising under the contract by submitting the dispute to arbitration in San Francisco, California,
 9 before an arbitrator of the American Arbitration Association. In addition, APL and D.S.R.
 10 agreed that the decision of the arbitrator “shall be final, binding and not subject to further
 11 review.” (*See* Service Contract, at p. 4 of 8, § 4(a), attached as Ex. A to Petition.)

12 Pursuant to the arbitration agreement, as detailed in section 4 of the above-described
 13 Service Contract, APL initiated arbitration proceedings with the American Arbitration
 14 Association (“AAA”). Following due notice to APL and D.S.R., including preliminary hearings
 15 by telephone, an arbitration was duly conducted by the AAA appointed arbitrator, Richard J.
 16 Collier, Esq., on or about April 4, 2007. On April 18, 2007, the arbitrator, Richard J. Collier,
 17 Esq., awarded APL the principal amount of \$14,700, attorneys’ fees of \$2,340, and costs of
 18 \$1,900, for a total award of **\$18,940**. (*See* Award of Arbitrator, dated April 18, 2007, attached as
 19 Ex. C to Petition.)

20 Section 4 of the above-described contract further provides that the decision of the
 21 arbitrator may be enforced by any court, tribunal, or other forum as may properly assert
 22 jurisdiction, and that the parties expressly consent and agree that the United States District Court
 23 for the Northern District of California shall have personal jurisdiction over the parties to the
 24 contract. (*See* Service Contract, at p. 4 of 8, § 4(b), attached as Ex. A to Petition.)

25 D.S.R. has failed to voluntarily satisfy the arbitration award in the time since it was
 26 made. A judgment on the arbitration award is needed to permit APL to enforce it. A

1 confirmation order and a conforming judgment are, therefore, authorized by the terms of the
2 arbitration agreement, section 9 of the Federal Arbitration Act, and the award itself.

3
4 **IV. CONCLUSION**

5 D.S.R. received what it bargained for – favorable ocean freight rates for its shipments
6 aboard APL vessels. D.S.R. did not, however, live up to its promises. D.S.R. failed to ship the
7 required number of FEUs under the Service Contract, even though it had over one year to do so.
8 The matter was submitted to arbitration as per the contract between the principals and the
9 arbitrator decided the matter in APL's favor.

10 D.S.R. owes APL the dead freight charges accrued as per the Service Contract between
11 the parties. Furthermore, D.S.R. forced APL to incur the expense of arbitration, including
12 attorneys' fees, to enforce the dead freight clause. The arbitrator awarded APL the dead freight
13 charges, attorneys' fees, and the costs of conducting the arbitration.

14 Accordingly, APL respectfully requests that the Court confirm the arbitrator's Award and
15 enter judgment in APL's favor for \$18,940.

16
17 DATED: September 25, 2007

18
19 By: 

20 Mark K. de Langis
21 Attorney for Petitioner
22 AMERICAN PRESIDENT LINES, LTD and
23 APL CO. Pte., LTD.
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PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in San Rafael, California at 2110 Elderberry Lane, San Rafael, California 94903. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

Today I served the attached:

**NOTICE OF MOTION AND MOTION TO CONFIRM
ARBITRATION AWARD; MEMORANDUM OF POINTS
AND AUTHORITIES**

**DECLARATION OF MARK K. de LANGIS IN SUPPORT
OF MOTION TO CONFIRM ARBITRATION AWARD**

**[PROPOSED] ORDER CONFIRMING AWARD OF
ARBITRATOR**

[PROPOSED] JUDGMENT

by causing true and correct copies of the above to be placed in the United States Mail at San Rafael, California in a sealed envelope(s) with postage prepaid, addressed as follows:

Gregory Centner
Vice-President, D.S.R. Shipping Co., Inc.
19 Roosevelt Street
Freehold, NJ 007728

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on September 25, 2007.



Mark K. de Langis